No. 87-416

IN THE

Supreme Court of the United States

October Term, 1987

UNITED STATES CATHOLIC CONFERENCE

and

NATIONAL CONFERENCE OF CATHOLIC BISHOPS,

Petitioners,

against

ABORTION RIGHTS MOBILIZATION, INC., *et al.*,

Respondents.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

MARSHALL BEIL
Attorney for Respondents,
Abortion Rights Mobilization, Inc., et al.
19 West 44th Street
New York, New York 10036
(212) 575-8500

MARK W. BUDWIG
DAWN E. JOHNSEN
Of Counsel

QUESTIONS PRESENTED

1. Whether a non-party witness, on the appeal of a civil contempt order, can challenge plaintiffs' standing to sue in the underlying lawsuit.

2. If so, whether respondents have standing as voters and clergy members to challenge the government's unconstitutional and unlawful enforcement of a provision of the Internal Revenue Code.

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RESPONDENTS' BRIEF IN OPPOSITION

For nearly two hundred years, the rule against interlocutory appeals has been a mainstay of the federal judiciary. Except in certain carefully defined circumstances, interlocutory orders -- even those relating to the trial court's jurisdiction -- cannot be appealed until after the entry of final judgment.

Petitioners below urged the Court of Appeals to create a new exception to the rule, an exception so broad that it would threaten the rule itself. The Court of Appeals, relying upon a 1919 decision of this Court and settled principles of appellate jurisdiction, declined to adopt the novel theory advanced by petitioners.

This Court should do the same. Petitioners have shown no valid reason for abandoning seventy years of precedent and two hundred years of judicial history to embark upon an entirely new and unwarranted course.

Statement of the Case

The petition seeks relief from a District Court order holding in contempt two non-party witnesses who have refused for more than four and one-half years to produce documents relevant to this action, in open defiance of two subpoenas and four orders of the trial court.

The witnesses, petitioners United States Catholic Conference ("USCC") and National Conference of Catholic Bishops ("NCCB"), do not dispute that they are in contempt. Nor do they make any arguments addressed to the nature or scope of the subpoenas or court orders themselves (such as suggesting that they are burdensome or implicate constitutional or other privileges).

Instead, the only issue petitioners raise is that the District Court erred in its 1982 and 1985 decisions denying motions to dismiss the action for plaintiffs' alleged lack of standing to sue. Petitioners, in other words, are attempting to appeal interlocutory orders of the trial court prior to the entry of final judgment. The Court of Appeals rightly rejected this unprecedented effort and this Court should also.

The underlying action challenges the constitutionality of the federal government's enforcement of the provision of § 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3), which prohibits tax-exempt religious, charitable and other organizations from

> participat[ing] in, or interven[ing] in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.[1]

The amended complaint charges that the defendants, the Secretary of the Treasury and the Commissioner of Internal Revenue, (referred to herein as "the government" or "the federal respondents") have exempted the Roman Catholic Church in the United States ("the Church" or

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1/The tax code bestows many benefits on religious or other charitable organizations qualified under Section 501(c)(3). The two most important are that the organization itself is exempt from income tax and donations to the organization are deductible on the donor's tax returns. 26 U.S.C. § 170.

"the Catholic Church") from the strictures of this statute and have allowed the Church -- but not respondents (the plaintiffs below) -- regularly and persistently to intervene in political campaigns for public office to support or oppose candidates according to their views on abortion.[2]

The amended complaint alleges, in brief, that the Catholic Church, in violation of the clear language and intent of the anti-electioneering provision of § 501(c)(3), has engaged in a nationwide, persistent and regular pattern of intervening in elections in favor of candidates who support the Church's position on abortion and in opposition to candidates with opposing views. The government, according to the amended complaint,

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2/Respondents have not made any allegations about the lobbying activities of the Catholic Church, or the government's enforcement of Internal Revenue Code provisions concerning lobbying.

despite its knowledge of these activities, has done nothing to enforce the law against the Church. The Internal Revenue Service has not revoked the tax-exempt status of the Church, or any of its constituent parts, and has not taken any appropriate preventive or prosecutorial measures to redress these violations of law. (C.A.App.7-23)[3]

By thus exempting the Catholic Church from the tax code, the government has granted the Church the equivalent of a subsidy of its partisan political activity -- a subsidy denied to respondents.[4] This favoritism towards the Catholic

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3/Reference to " a" is to the appendix to the petition for a writ of certiorari. Reference to "C.A.App. " is to the appendix in the Court of Appeals.

4/"Both tax exemptions and tax-deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization ...." Regan v. Taxation With Representation of Washington, 461 U.S. 540, 544 (1983).

Church violates respondents' rights under the Establishment Clause of the First Amendment, and entitles respondents, among other things, to an injunction requiring the Internal Revenue Service to take appropriate enforcement action against the Catholic Church.

After the amended complaint was filed in January 1981, defendants (which then included the USCC and the NCCB) moved to dismiss the amended complaint on the ground that plaintiffs lacked standing to sue, and for other reasons. (C.A.App.24) In its July 1982 opinion deciding the motion (54a-92a), the District Court for the Southern District of New York upheld the standing of twenty-four plaintiffs as clergy members, voters and organizations whose members are voters, to assert certain claims against the government. (55a-79a, 91a)[5]

5/The District Court dismissed the amended complaint in its entirety
[Footnote 5 continued on next page]

The government moved for certification of an interlocutory appeal of the District Court's decision under 28 U.S.C. § 1292(b). Although no longer parties, petitioners joined in that motion. (46a) The request was denied. Abortion Rights Mobilization, Inc. v. Regan, 552 F.Supp. 364 (S.D.N.Y. 1982).

Following that decision, in early 1983, the government and the respondents served separate deposition subpoenas duces tecum on the petitioners.[6]

[Footnote 5 continued from previous page] against the USCC and the NCCB for failure to state a claim against those two bodies. (83a-84a) The District Court also dismissed five plaintiffs, all health care facilities offering abortions, for lack of standing. (67a, 91a) Three more plaintiffs were subsequently dismissed by stipulation of the parties in March 1986. Fed. R. Civ. P. 41(a). Twenty-one plaintiffs (the respondents in this Court) remain.

6/It is undisputed that the documents called for by respondents' subpoenas are relevant to the subject matter of this action. The requests fall into several categories: the adoption and implementation of the portion of petitioners' 1975 Pastoral Plan for
[Footnote 6 continued on next page]

Petitioners responded by moving to quash the subpoenas in the Southern District of New York. The motion was denied and production ordered on April 3, 1984. (C.A.App.222) No discovery was had, however, as petitioners refused to produce any documents until after this Court's decision in Allen v. Wright, which was then pending. (46a)

After Allen was decided, 468 U.S. 737 (1984), the government renewed its

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[Footnote 6 continued from previous page] Pro-Life Activities dealing with political activities; identity of various Catholic officials, such as the names of the bishops or archbishops of certain dioceses and the directors of various state Catholic conferences and pro-life activities committees; financial support for and other contact with political candidates and certain identified "right to life" committees; and communications with the IRS and others concerning the Catholic Church's tax-exempt status and its compliance with the anti-electioneering provisions of § 501(c)(3). (C.A.App.160-79, 315-32)

The governments' subpoenas are reproduced at C.A.App.150-59 and C.A.App.529-33. The government has apparently done nothing to secure compliance with its subpoenas.

motion to dismiss for lack of standing. Petitioners submitted an amici brief in support of government's position. The District Court denied the motion in February 1985 (93a-102a), and again denied certification. (C.A.App.243-46)

In the summer of 1985 -- more than two years after the service of the subpoenas -- as petitioners had still not produced any documents, respondents moved to hold them in contempt. (C.A.App.232) Petitioners countered with a motion for a protective order, and the trial court held a pre-trial conference. (C.A.App. 238) In their motion papers and at the July 12, 1985 conference, petitioners expressed concern about the scope of the subpoenas under the First Amendment and asked for a further delay of production pending the filing of the government's anticipated petition for mandamus. (C.A.App.238-50)

The District Court carefully reviewed the subpoenas and, in its September 5, 1985 order, found that two requests "could conceivably trench on First Amendment considerations." (48a; C.A.App.251) The Court held that no documents need be produced under those two requests until narrowed by respondents to the satisfaction of either petitioners or the Court.[7] The District Court denied the other objections raised by petitioners and "ordered [them] to comply with the subpoena forthwith." (48a; C.A.App.252)[8]

Petitioners continued to refuse to produce any documents. As the govern-

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7/These two sections of the subpoenas, calling for minutes of internal church meetings, have been withdrawn by respondents in light of the District Court's order.

8/Respondents' motion for contempt was denied without prejudice to renewal "[i]n the event that there is a continued refusal or failure to obey the court's order." (C.A.App.252)

ment's mandamus petition had been filed in the Court of Appeals by the time the October 1985 conference was held, the District Court acceded to petitioners' request for more time, postponing production pending the decision on the petition. (49a; C.A.App.259-60) (Petitioners also submitted an amici brief in support of the government's petition.)

Throughout this waiting game, petitioners held out the hope -- falsely, the District Court found (47a-49a) -- that if the government's appellate efforts were unsuccessful, they would produce the requested documents. Consistent with this attitude, petitioners raised additional objections to the subpoenas in countering respondents' renewed contempt motion in October 1985. (C.A.App.287-88) At yet another pre-trial conference held on October 25, 1985, the District Court resolved petitioners' remaining objections to the subpoenas and ordered the

participants to attempt to agree on a protective order to protect any confidential documents. (48a-49a)[9]

The government's mandamus petition was denied by the Court of Appeals, without opinion, on January 14, 1986. In re Baker, 788 F.2d 3 (2d Cir. 1986) (table). The petition for rehearing was denied on March 3, 1986. (C.A.App.281)

On February 26, 1986, the District Court ordered document production to take place on March 7. (49a; C.A.App.280) Despite the Second Circuit's refusal to disturb the District Court's decisions on standing, despite the surgery performed on the subpoenas by the District Court to met petitioners' objections, and despite the negotiation and entry of a confidentiality order agreed to by petitioners,

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9/As directed, the parties to the action and petitioners agreed upon a confidentiality order which was entered by the District Court on February 4, 1986. (C.A.App.268-76)

petitioners still refused to produce any documents. On March 6, petitioners announced to the District Court and to the press (C.A.App.289, 373-74) that they would not comply with the order.

But this time, the District Court's patience with petitioners had reached its limit. In its May 8 and 9, 1986 orders -- the orders which are the subject of this petition -- the District Court held petitioners in contempt for willfully refusing to produce documents. The Court found that petitioners "did more than fail to be forthright with the court. They began to engage the court and the plaintiffs in a series of maneuvers that -- given [petitioners'] apparent intention of ultimate non-compliance -- made a game of the judicial process." (47a)

Concluding that petitioners had "wilfully misled the Court and the plaintiffs and ha[d] made a travesty of the court process" (44a-45a), the District

Court imposed sanctions of $50,000 a day on each entity until the documents were produced, and awarded respondents attorneys fees. (51a-53a)[10]

Petitioners appealed to the Court of Appeals for the Second Circuit, which affirmed the contempt order of the District Court. Relying on the rule against interlocutory appeals and this Court's decision in Blair v. United States, 250 U.S. 273 (1919), Judge Newman, writing for the majority, held that (10a):

> Blair stands for the proposition that a *witness* has more limited standing. Though the contempt adjudication of the witness is final and hence appealable, that appeal brings up for review only issues in which the witness is legally "interested," Blair v. United States, supra. Doubtless, these would include any issue that con-

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10/The fine was stayed by the District Court (52a-53a) and the stay has been extended by the Court of Appeals pending the determination of this petition. (105a-110a)

At the May 9, 1986 hearing on petitioners' application for a stay, Judge Carter stated that the fine would be paid to the United States Treasury and not respondents.

> cerns the witness personally, such as the district court's personal jurisdiction over the witness,... or any privilege the witness may have to resist divulging the information sought.... With respect to jurisdiction over the underlying action, however, Blair instructs that the witness may make only the limited challenge as to whether there exists a colorable basis for exercising subject matter jurisdiction, and not a full-scale challenge to the correctness of the district court's exercise of such jurisdiction.

After reviewing the allegations supporting respondents' standing, the majority concluded that "the District Court cannot be said to be usurping power in determining that subject matter jurisdiction exists" (19a).

Judge Cardamone dissented, arguing:

> Since a federal court's power to issue discovery and civil contempt orders derives from and necessarily depends on its jurisdictional power to hear the underlying action before it, I would hold that these witnesses are entitled on this appeal to challenge the district court's subject matter jurisdiction....

(21a)[11]

11/Although Judge Cardamone dissented from the judgment of the Court of
[Footnote 11 continued on next page]

As was the case in the Court of Appeals, petitioners' arguments in this Court are a reprise of the government's earlier petitions to the Court of Appeals and this Court.[12] Petitioners do not deny that they are in contempt and do not

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[Footnote 11 continued from previous page] Appeals, his opinion addressed only the scope of appellate review and did not discuss whether respondents actually had standing.

Judge Kearse concurred in the majority opinion and added an additional ground for it: discovery is appropriate to assist in gathering proof on the question of plaintiffs' standing.

12/The government, as previously noted, filed a petition for a writ of mandamus to the Court of Appeals which was denied in January 198[illegible], prior to the entry of the contempt order. In re Baker, supra. After the contempt order, the government filed petitions for a writ of certiorari (No. 86-157) and for a writ of mandamus or prohibition (No. 86-162) in this Court for the same relief the government had sought in the Court of Appeals -- the reversal of the District Court's interlocutory decisions upholding respondents' standing to sue. The Court denied both petitions. (Orders of October 6, 1986)

raise any objections to the subpoenas or District Court orders themselves.[13]

The sole ground advanced by petitioners in the Court of Appeals and in this Court is that since respondents do not have standing to bring the lawsuit the District Court does not have subject matter jurisdiction to entertain the action. (3a) The Court of Appeals affirmed the District Court and denied petitioner's appeal. This Court should do the same.

13/Petitioners did seek, unsuccessfully, in the Court of Appeals to reverse the lower court's award of attorneys fees, but have not raised that issue in this Court.

REASONS FOR DENYING THE PETITION

1. Petitioners, As Non-Party Witnesses, Cannot Appeal The District Court's Interlocutory Decisions Denying Motions to Dismiss the Underlying Action.

This petition presents an unprecedented attempt by a non-party witness to excuse its admitted refusal to comply with a court order on grounds completely unrelated to the propriety of the order. Unable to challenge the order's nature or scope, petitioners mount a collateral attack on the District Court's jurisdiction to entertain the underlying action. In effect, petitioners seek to convert their appeal of the contempt order against them into an appeal of the District Court's prior refusal to dismiss the action against the government for lack of standing to sue.

Petitioners have not cited, and respondents have not found, a single case permitting such a collateral attack. On

the contrary, the relevant precedent squarely rejects petitioners' argument. As the Court of Appeals held, petitioners, as non-party witnesses, cannot mount a "full-scale challenge to the correctness of the district court's exercise of [subject matter] jurisdiction." (10a) A district court's denial of a motion to dismiss is not appealable, by parties or non-parties, and the result is not changed merely because the would-be appellants happen to be in contempt of a court order enforcing a subpoena.

There is no rule more fundamental to federal appellate practice than than the one limiting appeals from the District Court to final orders and decrees. It is "'the dominant rule in federal appellate practice,'" DiBella v. United States, 369 U.S. 121, 126 (1962), reflecting far more than "merely technical conceptions of 'finality.'... It is [a policy] against piecemeal litigation." Catlin v. United

States, 324 U.S. 229, 233-34 (1945). As this Court has held:

> Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment.

Cobbledick v. United States, 309 U.S. 323, 325 (1940).

That the interlocutory order upholds the trial court's subject matter jurisdiction does not does not affect the order's appealability. Jurisdictional motions are treated like any other motion. Catlin v. United States, 324 U.S. at 233 (petitioners claimed that "the court acquired no jurisdiction of the cause or to enter the order").

Civil contempt orders, it is true, are appealable by the non-party contemnor without waiting for a final judgment in

the main action, United States v. Ryan, 402 U.S. 530 (1971), but the reasons for this exception to the final judgment rule also delimit its scope.

An immediate appeal is permitted because the order is in effect final as to the contemnor and because the contempt proceeding is entirely collateral to the main action, allowing the appeal to proceed without unduly interfering with either the final judgment rule or the progress of the underlying lawsuit. International Business Machines Corp. v. United States, 493 F.2d 112, 115 n.1 (2d Cir.), cert. denied, 416 U.S. 995 (1974); cf. Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). These considerations plainly do not justify extending the exception to appeals, by parties or non-parties, of the district court's rulings on the sufficiency of the complaint.

Not only is the case law consistent in refusing to entertain interlocutory appeals of jurisdictional orders, it has long been clear that a recalcitrant witness cannot excuse a refusal to give evidence by challenging the jurisdiction of the court. This Court so held nearly seventy years ago in rejecting a witness' challenge to the jurisdiction of a court and grand jury over the subject matter of the inquiry:

> [I]t is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the Government is bound to perform upon being properly summoned ... The duty, so onerous at times, yet so necessary to the administration of justice according to the forms and modes established in our system of government ..., is subject to to mitigation in exceptional circumstances; there is a constitutional exemption from being compelled in any criminal case to be a witness against oneself ...; some confidential matters are shielded, from considerations of policy, and perhaps in other cases for special reasons a witness may be excused from telling all that he knows.

But, aside from exceptions and qualifications, -- and none such is asserted in the present case, -- the witness is bound not only to attend, but to tell what he knows in answer to questions framed for the purpose of bringing out the truth of the matter under inquiry.

He is not entitled to urge objections of incompetence or irrelevancy, such as a party might raise, for this is no concern of his ...

On familiar principles, he is not entitled to challenge the authority of the court or of the grand jury, provided they have a de facto existence and organization.

... In truth it is, in the ordinary case, no concern of one summoned as a witness whether the offense is within the jurisdiction of the court or not.

Blair v. United States, 250 U.S. 273, 281-83 (1919) (citations omitted; emphasis added). As the Court of Appeals correctly held, Blair is controlling here and requires the rejection of petitioners' appeal.

Petitioners seek to distinguish Blair on the ground that the court's order in that case was issued pursuant to a grand jury investigation, which is not

subject to Article III limitations. But Blair does not rest on the broad investigatory powers of a grand jury. It holds, rather, that a witness is not entitled to challenge the underlying jurisdiction of the court to issue the order compelling testimony because the jurisdictional questions are of "no concern" to him. 250 U.S. at 283.[14]

What Blair teaches, in other words, is that a witness seeking to excuse his noncompliance with a subpoena is confined to such matters as privilege or other "special reasons" affecting him individually in his status as a witness.[15]

14/Compare Federal Trade Commission v. Ernstthal, 607 F.2d 488, 491 (D.C. Cir. 1979) (FTC's jurisdiction "of no interest" to nonparty appellants); cf. Fein v. Numex Corp., 92 F.R.D. 94, 97 (S.D.N.Y. 1981) (nonparty witness seeking to quash subpoena cannot assert insufficiency of pleadings).

15/Of course, if the subpoena is issued under authority of a particular statute, the witness may argue that the statute does not apply. See, e.g., United States v. Thompson, 319

[Footnote 15 continued on next page]

That the giving of testimony or the production of documents may be "onerous at times," 250 U.S. at 281, does not entitle the witness to raise issues that relate solely to the underlying action. The residual, unavoidable inconvenience of appearing and testifying is the consequence of a "public duty, which every person within the jurisdiction of the Government is bound to perform when properly summoned." United States v. Bryan, 339 U.S. 323, 331 (1950) (citing Blair).

Of course the inconvenience suffered by a witness cannot be undone by a reversal on appeal. But the same is true of the much greater burden borne by the defendant in the same case, and that burden has consistently been rejected as a basis for allowing an appeal from a

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[Footnote 15 continued from previous page] F.2d 665 (2d Cir. 1963) (Walsh Act does not authorize issuance of a grand jury subpoena to a witness outside the United States.)

non-final order. Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 35 (1980); Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 383 (1953). Such costs to both witness and defendant are unavoidable consequences of the rule against interlocutory appeals but they do not constitute the kind of irreparable injury that creates finality and standing to appeal.[16]

The principle announced in Blair is not affected by whether the issue that the witness seeks to raise is "jurisdictional." That was the case in Blair itself, and none of the cases cited by

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16/Maness v. Meyers, 419 U.S. 449 (1975), cited by petitioners (Pet. 12, n. 12), is not to the contrary. In that case the appellant asserted a Fifth Amendment privilege, which the Court found might be irreparably compromised by compliance. 419 U.S. at 462 n. 10 and accompanying text. Petitioners here, while claiming "real injuries" that might flow from compliance (Pet. 12), identify none and assert no constitutional or other privilege against producing the subpoenaed documents.

petitioners holds otherwise. The statements in those cases, noting the duty of every federal court to examine its jurisdiction, are all implicitly, but necessarily, qualified by the requirements of orderly judicial process. Nothing in United States v. United Mine Workers, 330 U.S. 258 (1947), or United States v. Morton Salt, 338 U.S. 632 (1950), or any other case petitioners cite, suggests that the ordinary rules governing appellate procedures, such as the rule against interlocutory appeals, can be cast aside merely because a litigant seeks to raise a jurisdictional issue.[17]

17/Petitioners quote language (Pet. 14) from United States v. United Mine Workers to the effect that a civil litigant may not profit from a fine imposed by a contempt order later set aside. 330 U.S. at 294-95. As the Court of Appeals noted, however, the ultimate disposition of the fine is not at issue here (14a-15a), and respondents, in any event, are unlikely to not profit from the fine, as Judge Carter has said that the fine is to be paid into the United States Treasury. See n. 10, supra.

[Footnote 17 continued on next page]

Certainly it is not the case, as petitioners appear to argue, that an appellate court is bound to consider any and every challenge to the subject matter jurisdiction of the district court that is brought to the appellate court's attention. As previously noted, the denial of a motion to dismiss, for example, is not appealable, even if the issue is subject matter jurisdiction. Catlin v. United States, 324 U.S. 229 (1945).

Similarly, a petition for a writ of mandamus or prohibition raising jurisdictional issues is treated like any other petition for an extraordinary writ. No special rules apply:

[Footnote 17 continued from previous page]
Nor is it a valid criticism, as petitioners contend (Pet. 17), that no court prior to this case has had occasion to apply Blair to an appeal from a contempt order in a civil action. Quite the contrary. That the issue has never arisen before now is an striking indication of the novelty of petitioners' theory and its
[Footnote 17 continued on next page]

> [A]ppellate courts are reluctant to interfere with the decision of a lower court on jurisdictional questions which it was competent to decide and which are reviewable in the regular course of appeal.

Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1942). Only if the action of the lower court amounts to "a usurpation of power" is mandamus appropriate. Pfizer, Inc. v. Lord, 522 F.2d 612, 615 (8th Cir. 1975), cert. denied sub. nom. Government of India v. Pfizer, 424 U.S. 950 (1976).[18]

[Footnote 17 continued from previous page]
fundamental conflict with settled principles.

18/See, e.g., American Airlines, Inc. v. Forman, 204 F.2d 230, 232 (3rd Cir.), cert. denied, 349 U.S. 806 (1953) ("If a rational and substantial legal argument can be made in support of the questioned jurisdictional ruling, the case is not appropriate for mandamus or prohibition even though on normal appeal a reviewing c urt might find reversible error"); American Fidelity Fire Insurance Co. v. United States District Court, 538 F.2d 1371, 1375 (9th Cir. 1976) ("While we might well decide the case differently if it were before us on appeal, we cannot conclude that there is no rational and substantial legal argument in support of the district court's decision ."); Formica Corp. v. Lefkowitz, 590 F.2d
[Footnote 18 continued on next page]

One case on which petitioners place particular emphasis, Bender v. Williamsport Area School Dist., 106 S.Ct. 1326 (1986), is highly instructive, but it offers no comfort to petitioners. According to Bender, "[o]n every writ of error or appeal, the first and fundamental question is that of jurisdiction, *first, of this court, and then of the court from which the record comes ....*" 106 S.Ct. at 1334 (emphasis added). Bender does not establish the automatic appealability of any challenge to the jurisdiction of district court; it teaches, rather, that the threshold issue in any appeal is *appellate* jurisdiction -- what can be properly raised before the appellate court.

[Footnote 18 continued from previous page] 915, 920-22 (C.C.P.A.), cert. denied, 442 U.S. 917 (1979) (dismissing petition to review lower court decision upholding plaintiff's standing to sue).

Surely petitioners do not mean to suggest that the result in Bender would have been different, that the would-be appellant would have had standing to appeal the District Court's decision, if the grounds for his appeal had not been that the District Court decided the merits incorrectly, but that the trial court lacked subject matter jurisdiction. Yet that, in substance, is their position here. Petitioners' appeal has nothing whatever to do with the contempt order. It is addressed solely to the issue of the subject matter jurisdiction of the underlying action.

To permit collateral attacks on jurisdiction by non-party witnesses would have devastating consequences on the ability of the district courts to enforce their orders and to manage the flow of litigation. At any time a lawsuit could come to an abrupt halt, simply because a non-party witness alleged a defect in the

court's jurisdiction. Since the witness would not be bound by any prior ruling on the subject, that the district court had already examined its jurisdiction would count for naught.

If a subpoena were issued by a district court other than the one in which the action was pending, the witness could insist that his challenge be ruled on by the issuing court, Fed. R. Civ. P. 45(d), raising the possibility of inconsistent jurisdictional rulings by district courts or even by courts of appeals in the same case.[19] In any case that presented a

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19/The subpoenas in the instant case, for example, were issued by the District Court for the District of Columbia (C.A.App.315,325), where petitioners are headquartered. Petitioners chose to keep the proceedings in the Southern District of New York where the action is pending by moving in that District for a protective order. Fed. R. Civ. P. 26(c). Had they chosen instead to serve objections to the subpoena under Rule 45(d)(1), a motion to compel could only have been brought in the District of Columbia, id., and an appeal from any ensuing order of contempt could only have been

[Footnote 19 continued on next page]

close question as to subject matter jurisdiction, no party could be sure of his ability to obtain evidence by subpoena -- and no trial court could be sure of its ability to proceed to trial -- until this Court had ruled.

Petitioners' argument threatens to undermine entirely the rule against interlocutory appeals. Its adoption would be an open invitation to collusion between parties and friendly non-party witnesses to secure expedited review of jurisdictional rulings -- or other issues that would result in dismissal of the case.[20]

[Footnote 19 continued from previous page] brought in the District of Columbia Court of Appeals. In re Corrugated Antitrust Litigation, 620 F.2d 1086 (5th Cir. 1980).

20/While petitioners naturally focus on the example of a jurisdictional challenge, they nowhere explain why a witness should be limited to appealing only jurisdictional questions. If a witness has standing to attack a complaint by virtue of the witness' purported interest in not being
[Footnote 20 continued on next page]

Since civil contempt can be purged at any time by compliance, and the courts appear willing to grant stays of enforcement pending appeal, there would be no real risk to such disobedience. The result would be the serious disruption of orderly judicial processes and the end to the rule against interlocutory appeals.

Indeed, this case provides an excellent example of how the appeal from a contempt order can be used to circumvent the rule against interlocutory appeals. The federal respondents, with petitioners' support as amici in the District Court and the Court of Appeals, unsuccessfully attempted to obtain appellate

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[Footnote 20 continued from previous page] compelled to furnish evidence in a suit that should be dismissed, then there is no principled way to bar the witness from asserting any other defect that would warrant dismissal of the underlying action and render the witness' participation unnecessary.

review of the denial of the motions to dismiss.[21]

Now come petitioners -- with the government's support -- seeking the identical relief, plenary appellate review of interlocutory orders of the District Court. Indeed, the government in this proceeding has dropped all pretense of seeking anything else and argues in its brief that "the court of appeals, presented with the issue in a direct appeal that is not burdened by the restrictions that attend the issuance of an extraordinary writ, should have granted petitioners' request to vacate the contempt order because of lack of jurisdiction over the underlying lawsuit." (Fed. Resp. Br. 7)

21/The government twice sought certification under 28 U.S.C. § 1292(b), and petitioned both in the Court of Appeals and this Court for a writ of mandamus.

To preserve the rule against interlocutory appeals, the Court of Appeals in this case wisely applied to the District Court's determination the same presumption of validity and minimal scrutiny appropriate to petitions for an extraordinary writ:

> In the instant case, though the issue of subject matter jurisdiction over the underlying lawsuit is a substantial question, *the District Court cannot be said to be usurping power* in determining that subject matter jurisdiction exists.

(19a; emphasis added). Compare Pfizer, Inc. v. Lord, supra, 522 F.2d at 615.[22]

The standard of review adopted by the Court of Appeals successfully reconciles jurisdictional concerns with the federal courts' strong policy against piecemeal appeals. It promotes consis-

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22/As Judge Newman observed, a similar standard is also applied to a collateral attack on a judgment entered after litigation of subject matter jurisdiction. (19a) See Nemaizer v. Baker, 793 F.2d 58, 64-66 (2d Cir. 1986)(Cardamone, J.).

tency and predictibility. It is of a piece with history and precedent. It is, in a word, correct.

The instant petition and the appeal below are indistinguishable from the government's prior petitions for the same relief. While the USCC and NCCB are now petitioners instead of amici, their arguments and their interest in the case are unchanged. Like its predecessor, this petition for a writ of certiorari should be denied.

2. Respondents Have Standing

As shown in the previous section, petitioners cannot mount a "full-scale challenge to the correctness of the district court's exercise of [subject matter] jurisdiction." (10a) Since petitioners cannot appeal the District Court's refusal to dismiss the complaint for lack of standing, their attack on

that refusal is analogous to a petition for an extraordinary writ and, as the Court of Appeals recognized, should be judged by the standards appropriate to such a petition.

Under those standards, the petition should be denied. As the Court of Appeals held, "though the issue of subject matter jurisdiction over the underlying lawsuit is a substantial question, the District Court cannot be said to be usurping power in determining that" respondents have standing to sue. (19a)

Indeed, any other conclusion would appear to be foreclosed by this Court's refusal last Term to grant the government's petition for mandamus (No. 86-162) or to review the denial of mandamus by the Court of Appeals (No. 86-157). Although the identity of the petitioner has changed, the issue has not.

Should this Court choose to inquire more deeply into the merits of the Dis-

trict Court's decision, the result should be the same: the District Court properly sustained the standing of the clergy and "voter" respondents.

The prerequisites for standing have not been disputed by the parties or the District Court and can be fairly easily stated. Grounded in the "case or controversy" provisions of Article III of the Constitution, the standing doctrine requires a plaintiff to "allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." Allen v. Wright, 468 U.S. 737, 751 (1984). In addition, the plaintiff must satisfy the so-called "prudential" concerns, reflecting "judicially self-imposed limits on the exercise of federal jurisdiction." Id.

Petitioners and the federal respondents (referred to collectively in this section as "petitioners") argue that the

clergy respondents have failed to allege a cognizable injury under the Establishment Clause and that the injury alleged by the "voter" respondents is neither "fairly traceable" to the government's conduct nor "likely to be redressed by the requested relief." Petitioners also assert as grounds for dismissal the prudential limitation "barring adjudication of generalized grievances more appropriately addressed in the representative branches." 468 U.S. at 751. Petitioners' challenges are without merit.[23]

23/As the issue of standing was raised below on motions to dismiss the amended complaint, the Court is required to accept as true all the material allegations of the amended complaint (C.A.App.7-23) and the additional affidavits submitted by respondents in opposition to the motion (C.A.App.34-86), and to construe these facts in the light most favorable to the respondents. Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 109 n.22, 112 (1979); Warth v. Seldin, 422 U.S. 490, 501 (1975).

A. The Clergy Respondents: To confer standing, a plaintiff's injury must be "'distinct and palpable,'" Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979), and cannot be "'abstract' or 'conjectural' or hypothetical,'" Allen v. Wright, 468 U.S. at 751. It does not, however, have to be economic.

In Allen v. Wright, this Court reaffirmed that "stigmatizing injury" is the "sort of noneconomic injury [which] is one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing." 468 U.S. at 755, citing Heckler v. Mathews, 465 U.S. 728, 739-40 (1984) ("discrimination itself ... by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community,... can cause serious non-economic injuries").

The Court has specifically held that violation of a plaintiff's "spiritual stake in First Amendment values" is sufficient injury to confer standing, Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 154 (1970):

> A person or a family may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause and the Free Exercise Clause. Abington School District v. Schempp, 374 U.S. 203.

Governmental discrimination among religions strikes at heart of the spiritual values the Establishment Clause was designed to protect by creating "an atmosphere of official denominational preference" that deprives the nonpreferred religions of "the liberty to exercise and propagate [their] beliefs." Larson v. Valente, 456 U.S. 228, 245 (1982). "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." Id. at 244.

Coercion is not a necessary element of a violation of the Establishment Clause. The injury is the discrimination itself. In the words of Justice Black:

> The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not.

Engel v. Vitale, 370 U.S. 421, 430 (1962). Thus, a violation of that Clause need not "include proof that [plaintiffs'] particular religious freedoms are infringed." Abington School District v. Schempp, 374 U.S. at 203, 224 n.9. (1963). It is sufficient that plaintiffs show that they are "directly affected by the laws and practices against which their complaints are directed." Id.

That requirement is clearly satisfied here. Unlike the plaintiffs in Valley Forge Christian College v.

Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982), the clergy respondents here do not rely on the abstract injury common to all citizens that results when the government acts illegally. Rather, clergy respondents suffer a distinct and concrete stigmatizing injury that satisfies the standards set forth by this Court.

The respondents are each clergy members of religious institutions and denominations that do not share the Catholic Church's theological abhorrence of abortion.[24] Their work is to practice and teach their particular religious beliefs. They are active in the abortion rights movement but under § 501(c)(3) must refrain from engaging in certain

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24/The clergy respondents are Rabbi Israel Margolies, Reverend Beatrice Blair, Rabbi Balfour Brickner, Reverend Robert Hare, Reverend Marvin G. Lutz, and the Women's Center for Reproductive Health which was founded by Reverend Lutz and is an extension of his ministry (C.A.App.64-67).

activities, such as speaking from the pulpit in support of candidates for public office, which they could otherwise employ to obtain greater public approval or acceptance for their teachings.[25]

Catholic clergy on the other hand, according to the amended complaint, are subjected to no comparable restraint and may, while the same opportunity is denied to respondents, combine religion and partisan politics without jeopardizing their tax-exempt status. This governmental favoritism makes it more difficult for respondents, vis-a-vis their Catholic counterparts, to convey their message and beliefs to their congregants and the public. As the District Court found after reviewing the affidavits of the clergy respondents:

25/Engaging in these prohibited activities would lead to the loss of tax-exempt status under § 501(c)(3), and make it more expensive and difficult for respondents and their congregations to carry on their religious missions.

> The clergy plaintiffs have devoted their lives to religious communities and beliefs that are denigrated by government favoritism to a different theology. ... Tacit government endorsement of the Roman Catholic Church view of abortion hampers and frustrates these plaintiffs' ministries. The government need not silence these plaintiffs to cause discrete spiritual injury because official approval of an orthodoxy antithetical to their spiritual mission diminishes their position in the community, encumbers their calling in life, and obstructs their ability to communicate effectively their religious message.

(67a-68a)(footnote omitted).

Thus, unlike the plaintiffs in Allen v. Wright, who could not claim that they personally had been subjected to discrimination as a result of the government's policy, 468 U.S. at 746, respondents here are personally, directly affected in the daily exercise of their professional calling by the discriminatory governmental policy they challenge.

This difference is made even more apparent when one examines the second and

third elements of the standing test. In Allen, the Court held that plaintiffs' alternate ground for standing, that the government's actions had diminished their children's ability to attend racially integrated schools, was not "fairly traceable" to the challenged government conduct. The Court noted that it was "entirely speculative" whether a change in the government policy would increase the opportunity for respondents to attend integrated schools. 468 U.S. at 757, 758.

By contrast, the clergy respondents here are personally denied the opportunity to engage in partisan political activity and to foster their respective religious missions with the same official status and on the same statutory terms and conditions as another tax-exempt religious entity. This injury is caused solely by the government's discriminatory enforcement of the law -- by the federal

respondents' favoring one religion over others -- and can be readily redressed by a court order requiring the cessation of the offending practice. As the District Court found (69a, 96a):

> [Respondents'] injury flows directly from the federal defendants' allowing the church defendants the privilege of retaining § 501(c)(3) status while electioneering and denying this privilege to other religious organizations. The granting of a uniquely favored tax status to one religious entity is an unequivocal statement of preference that gilds the image of that religion and tarnishes all others. A decree ordering the termination of this illegal practice and restoring all sects to equal footing will redress this injury.

Injunctive relief requiring the Internal Revenue Service to end the preferential treatment of the Catholic Church will redress respondents' injury. Thenceforth, respondents and their Catholic brethren would be treated equally by the government.[26]

26/Standing is not defeated simply because the challenged governmental activities are directed at persons

[Footnote 26 continued on next page]

Accordingly, the District Court's determination that the clergy respondents have standing to maintain this action is correct.

B. "Voter" Standing: The District Court held further that respondents who were voters, campaign contributors (C.A.App.38-45), a past and potential future candidate for public office (C.A.App.84) and a political party official (C.A.App.60) had standing to bring this action under a theory of "voter standing."[27]

[Footnote 26 continued from previous page] other than the respondents. Such is almost always the case in Establishment Clause cases. See Engel v. Vitale, 370 U.S. at 438 (Douglas, J. concurring); Warth v. Seldin, 422 U.S. at 505 ("indirectness of the injury does not necessarily deprive the person harmed of standing to vindicate his rights").

27/In addition, three organization plaintiffs, Abortion Rights Mobilization, Inc., National Women's Health Network, Inc. and Long Island National Organization for Women - Nassau, Inc. were found to have standing on behalf of their members who are voters. (69a-

[Footnote 27 continued on next page]

The injury suffered by the "voter respondents" arises from the distortion of the political process caused by the government's subsidy of the partisan political activities of one participant in the political process, the Catholic Church, but not others, including the respondents.[28]

[Footnote 27 continued from previous page]
70a)Of the twenty individual plaintiffs whose standing was upheld, seventeen remain in the case. N.5, supra.

28/This Court has repeatedly recognized the constitutional "right to a vote free of arbitrary impairment by state action..." Baker v. Carr, 369 U.S. 186, 208 (1962), and of the standing of voters to challenge governmental action that "plac[es] them in a position of constitutionally unjustifiable inequality vis-a-vis [other] voters." 369 U.S. at 207. The government not only is prohibited from depriving individuals of their vote, but it also may not dilute the value of any vote. See, e.g., White v. Weiser, 412 U.S. 783 (1973); Reynolds v. Sims, 377 U.S. 533 (1964). See also Vander Jagt v. O'Neill, 699 F.2d 1166 (D.C.Cir.), cert. denied, 464 U.S. 823 (1983); O'Hair v. White, 675 F.2d 680 (5th Cir. 1982)(en banc), and the cases cited by the District Court at 71a-74a, 98a.

The tax exemption for electioneering granted the Catholic Church by the federal respondents distorts the political process by subsidizing the Church's (and its contributors') political activities, while it denies respondents the same benefit. This diminishes the effectiveness of respondents' contributions to political candidates as compared to those of the Church and its donors.[29]

Respondents are harmed further when the government permits the Catholic Church, but not respondents, to use the power and prestige arising from the Church's standing in the community to

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29/Since respondents' political contributions are not deductible, it costs respondents considerably more to give $1,000 to a candidate, for example, than it costs a donor to make a similar contribution to a candidate by means of a donation to the Catholic Church. Candidates backed by the Church, therefore, can raise funds more easily than the respondents' candidates. Needless to say, the ability to raise funds has a substantial impact on the outcome of political campaigns.

partisan advantage, and to employ the Church's organization and membership structure to support or oppose political candidates. These advantages in the political process are denied respondents.

These injuries are caused, not by the partisan political activity of the Catholic Church, but by government action -- or, more accurately, inaction -- with respect to that political activity. Respondents' injuries can be eliminated by an order which requires the government to end its favoritism toward the Catholic Church, thus eliminating the government-caused distortion of the political process. If thereafter the Catholic Church continued to engage in partisan political activities, it would have to do so on the same basis as respondents -- that is, by foregoing its tax-exempt status and by financing such activities without tax-deductible dollars.

Respondents do not challenge the right of the Catholic Church to support candidates. They argue only that the government's support for and subsidy of Catholic Church electioneering activity is unlawful and unconstitutional. It is irrelevant, therefore, whether the Church will continue to be active politically or if its members will increase their donations. If the government applies to the Catholic Church the same standards regarding political use of tax-exempt, tax-deductible dollars as it applies to respondents, the governmentally-caused arbitrary inequality of which respondents complain will have been eliminated. See Heckler v. Mathews, 465 U.S. 728, 739 (1984).

Thus neither Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976), nor Allen v. Wright, 468 U.S. 3315 (1984), upon which petitioners rely, is on point. In Simon, plaintiffs'

alleged injury was their inability, as indigent patients, to obtain hospital services without charge. They could not show, however, that a change in the Internal Revenue Service regulations they challenged would result in a change in the hospitals' policies towards indigent patients, as those policies were determined by many factors, only one of which was before the Court. Since the hospitals were free to deny plaintiffs medical services regardless of how the IRS regulations were drawn, the Court held that the respondents could not meet the causation or redressability requirements for standing.

In Allen, plaintiffs' injury was the diminished ability to obtain racially-integrated schooling. Since plaintiffs could not show that a change in the Internal Revenue Service policy would alter the segregated schools' admissions policies, which were determined independently,

the line of causation between plaintiffs' injury and the challenged action was too attenuated to support standing.

In the case at bar, however, the injury to respondents is not the Catholic Church's political activities per se, but the government's subsidy of those activities. If that tax benefit is removed -- by an order requiring equal enforcement of the tax code -- the cause of respondents' injury will also be removed. As the District Court held (99a):

> The judicially cognizable injury in Allen was segregated schooling which was neither created nor remediable by IRS action alone. The injury alleged in ARM is unequal footing in the political arena, a condition completely traceable and within the control of the IRS.

The decisions of the District Court upholding respondents' standing to sue,, far from being a departure from Simon and Allen, are a direct application of the principles for which they stand.

C. Prudential Concerns: Petitioners rely heavily on Allen v. Wright's analysis of the judicially-imposed prudential limitations on standing to argue against standing here. Such concerns do not defeat standing in this case.

Plaintiffs in Allen had requested nation-wide relief in the form of an injunction compelling the Internal Revenue Service to adopt a new system of rules and regulations concerning enforcement of the policy against tax support for segregated schools. The plaintiffs "[did] not challenge particular identified unlawful IRS actions," 468 U.S. at 766, but only made "general complaints about the way in which government goes about its business," id. at 760.[30]

30/The Court in Allen, stated, however, that its holding "[did] not rest on the more general proposition that no consequence of the allocation of administrative enforcement resources is judicially cognizable." 468 U.S. at 761 n.26.

By contrast, respondents here do not challenge a general regulatory scheme but rather allege serious infringements of their constitutional rights directly caused by specified unlawful conduct of the Internal Revenue Service -- namely, its discriminatory non-enforcement of a specific prohibition in the tax code against a persistent and well-publicized offender.[31] As the District Court put it:

> Plaintiffs do not seek resolution of "abstract questions;" they have articulated particular improper actions by the church defendants and illegal and unconstitutional disregard for that activity by the government defendants. Although the complaint implicates social policy issues, it does not call for judicial selection of an appropriate policy. Congress already has made that choice and set out the correct

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31/Nor is there any ambiguity about the criteria to be applied. Section 501(c)(3) contains an absolute prohibition against partisan political activity by tax-exempt organizations. In writing this statute, Congress has spoken "[w]ith undeniable clarity." Bob Jones University v. United States, 461 U.S. 574, 613 (1983) (Rehnquist, J. dissenting).

> policy in § 501(c)(3); plaintiffs ask only for a judicial determination of whether defendants have observed Congress's commands concerning paying taxes and engaging in political activity. The prudential barriers do not restrict a court from adjudicating such a claim merely because of the interplay between the litigation and social controversy.

(79a, 101a-102a).

This Court has repeatedly reaffirmed that the Constitution requires the judiciary to protect the fundamental rights of all citizens and that relief from infringements of those rights by the government cannot be left solely to the political process. "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy ... and to establish them as legal principles to be applied by the courts." West Virginia State Board of Education v. Barnette, 319 U.S. 624, 638 (1943). The judiciary's proper role clearly extends to ensuring that administrative agencies do not violate

explicit Congressional directives when those violations infringe on fundamental constitutional rights.

To rely on prudential notions of separation of powers would be peculiarly inappropriate where, as here, the infringement involves specific administrative activity which distorts and "restricts those political processes which can ordinarily be expected to bring about [relief]..." United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

On the contrary, concern about the separation of powers militates in favor of invoking jurisdiction in this case, so as to prevent the tainting of the political process by specifically identified, unlawful and unconstitutional governmental action. As the Fifth Circuit held in a similar context:

> We do not believe that prudential notions of self-restraint in the area of standing are properly invoked in cases involving the dilution

> of an individual's fundamental voting rights: when a complaint alleges injury stemming from a clogged democratic process, it would be anomalous to require the plaintiff to seek relief from political institutions.

O'Hair v. White, 675 F.2d 680, 689 (5th Cir. 1982)(en banc).

Accordingly, the District Court's decisions on standing are eminently correct, and certainly cannot be said to constitute the usurpation of power. The District Court's rulings on standing are supported by rational and substantial arguments and should not be disturbed at this interlocutory stage by this Court.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari to the Court of Appeals should be denied.

Respectfully submitted,

MARSHALL BEIL
Attorney for Respondents
19 West 44th Street
New York, New York 10036

Mark W. Budwig
Dawn E. Johnsen

Of Counsel

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